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In the
Court of Criminal Appeals of Texas
At Austin

No. 1524656
In the 182nd District Court
Of Harris County, Texas

ROBERT EARL HART
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

IDENTIFICATION OF THE PARTIES

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PRESIDING JUDGE:

Hon. Danilo Lacayo
182nd District Court
Harris County, Texas

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 68.4(d), the State requests oral argument and submits that a more comprehensive discussion of the facts involved in this case would assist this Court in determining whether defense counsel's decision not to seek a sudden passion instruction was objectively unreasonable, and whether appellant was harmed by the absence of such an instruction.

STATEMENT OF THE CASE

Appellant was charged with the first-degree felony offense of murder. (C.R. 11). Following a jury trial, appellant was convicted of the charged offense and sentenced to thirty years of imprisonment in the Institutional Division of the Texas Department of Criminal Justice. (C.R. 97, 106). Appellant appealed his conviction, arguing that his trial attorney was ineffective for failing to request an instruction on sudden passion at the punishment phase of trial. The Fourteenth Court of Appeals reversed the conviction and remanded the case to the trial court for a new punishment hearing.

STATEMENT OF PROCEDURAL HISTORY

On May 13, 2021, a majority panel of the Fourteenth Court of Appeals issued a published opinion affirming the portion of the judgment regarding appellant's

conviction, reversing the portion of the judgment of the trial court regarding punishment, and remanding the case to the trial court for a new punishment hearing. *Hart v. State*, No. 14-19-00591-CR, 2021 WL 1920893 (Tex. App.—Houston [14th Dist.] May 13, 2021) (Appendix A). A published dissenting opinion was authored by Justice Wise. (Appendix B).

On June 28, 2021, the State filed a motion for en banc reconsideration. The court of appeals denied the motion for en banc reconsideration on September 16, 2021.

On October 18, 2021, the State moved for an extension of time to file its petition for discretionary review. The State's petition for discretionary review is now due to be filed on November 22, 2021.

GROUNDS FOR REVIEW

1. Whether the majority opinion fails to defer to the strong presumption that trial counsel's decision not to pursue a sudden passion instruction fell within the wide range of reasonably professional assistance?

2. Whether the majority opinion's harm analysis improperly disregards the effect of the jury's rejection of appellant's theory of self-defense?

REASONS FOR REVIEW

The State submits that this Court should grant discretionary review because the majority opinion contravenes long-standing precedent that defense counsel should be afforded a meaningful opportunity to explain his actions before being denounced as

ineffective. Discretionary review should also be granted to curtail the adverse, wide-reaching implications of the majority opinion, which effectively requires defense counsel to seek an instruction on sudden passion, regardless of whether such an instruction contradicts with counsel's defensive strategy.

ARGUMENT AND AUTHORITIES

The complainant began dating the appellant's daughter Stephanie during the months leading up to the charged offense. Stephanie quickly moved in with the complainant, but their relationship was volatile and Stephanie attempted to end the relationship several times. (V R.R. 39-40, 51).

On the day before the shooting, Stephanie spent the night at her parents' home. (V R.R. 60). The Hart family was having lunch the following day when the complainant arrived at the home uninvited and parked his rental vehicle across the street. (V R.R. 61-62). The family was alerted to the complainant's arrival because they had multiple surveillance cameras posted outside the home. (V R.R. 61). The complainant got out of the car, removed his shirt, and began smoking a cigarette near the open driver's side door. (VIII R.R. SX 76). Appellant went outside holding a gun and confronted the complainant. *Id.* A brief verbal exchange occurred before appellant pointed the gun at the complainant and opened fire, striking the complainant multiple times. *Id.* Appellant continued shooting at the complainant as he ran and ducked for cover behind the rental car. *Id.* Moments later the complainant collapsed to the ground and ceased moving. *Id.*

He had been shot six times; two of the bullets struck him in the back. (V R.R. 14, 21, 24; VIII R.R. SX 5).

Appellant approached the complainant's body, removed a second gun from his own pocket, fired it once into the distance, and then placed the gun in the complainant's hand. (VIII R.R. SX 76).

Appellant later told law enforcement officers that he had warned the complainant to leave the premises. (VIII R.R. SX 77). Appellant claimed that he heard what he believed was a gunshot, so he returned fire several times. (IV R.R. 75, 82; VIII R.R. SX 77). Appellant told police that he saw a weapon in the complainant's hand after the shooting. (IV R.R. 76).

Appellant also told law enforcement officers that the surveillance cameras posted outside his home were "dummy cameras" that did not record. *Id.* The police discovered that the surveillance cameras were, in fact, operational after appellant's wife provided written consent to search the home and they viewed footage of the shooting. (IV R.R. 29, 39-40, 54, 57). When they informed appellant that they had seen footage of the incident, appellant invoked his right to counsel. (VIII R.R. SX 77). Appellant was ultimately charged with first-degree murder.

At the conclusion of trial, the jury rejected appellant's theory that he was acting in self-defense and convicted him of murder. During the charge conference at the punishment phase of trial, appellant's trial counsel opted not to seek an instruction on sudden passion:

THE COURT: Okay, so I'm reading the jury charge with respect to the punishment phase of trial. And I proposed a - - just for proposals - - a special issue regarding sudden passion, adequate cause sudden passion. And Mr. Dixon, you are telling me that you do not want that in there. As you've discussed with the State, you don't believe the facts support it; is that correct?

MR. DIXON: That is correct, Judge. I went through about six pieces of case law, and there was one that was directly on point and it just - - it wasn't supported by the facts.

THE COURT: So, I'm going to take out the sudden passion part out of it. And other than that, do you have any - - have you had an opportunity to read the charge yet?

MR. DIXON: Yes. I read it yesterday, Judge.

THE COURT: Is there any objections, additions, subtractions?

THE STATE: Not from the State.

MR. DIXON: Not from the defense.

(VII R.R. 5-6).

On appeal, a majority panel of the Fourteenth Court of Appeals held that trial counsel had "removed" a sudden passion instruction from the jury charge despite evidence supporting such an instruction. *See Hart v. State*, No. 14-19-00591-CR, 2021 WL 1920893, at *5-6 (Tex. App.—Houston [14th Dist.] May 13, 2021). The majority panel reasoned that counsel's subjective belief that his client was not entitled to a sudden passion instruction could not form the basis for a sound trial strategy; therefore, it was objectively unreasonable for counsel to seek removal of the instruction from the charge. *Id.* at *6.

I. The majority opinion fails to defer to the strong presumption that counsel's performance fell within the wide range of reasonably professional assistance.

An appellate court's review of counsel's performance must be highly deferential, and the reviewing court must indulge "a strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005). The reviewing court will "rarely be in a position on direct appeal to fairly evaluate the merits of an ineffective assistance claim" because in "the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions." *Id.* (quoting *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001)). Trial counsel "should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003).

Here, trial counsel was not given an adequate opportunity to explain his reasoning. The majority opinion erroneously presumes that trial counsel did not have a legitimate, undisclosed strategy for declining to pursue a sudden passion instruction. "The reasonableness of counsel's choices often involves facts that do not appear in the appellate record." *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). The reviewing court "commonly will assume a strategic motivation if any can possibly be imagined." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (quoting 3 W. LaFave, et al., *Criminal Procedure* § 11.10(c) (2d ed. 1999)). Considering that the record on appeal has not been sufficiently developed to reflect the motives behind counsel's

actions, the majority panel should have deferred to the strong presumption that counsel's decision fell within the wide range of reasonable professional assistance. *See Rylander*, 101 S.W.3d at 110-11 (refusing to denounce trial counsel as ineffective where counsel had not been provided a meaningful opportunity to explain his actions and the record on direct appeal was not sufficiently developed to show that counsel's performance was objectively deficient).

The dissent correctly observes that the majority opinion's analysis is limited solely to whether appellant was entitled to an instruction, and fails to address whether counsel may have strategically decided not to pursue the theory of sudden passion. *See Hart*, 2021 WL 1920893, at *9-10 (Wise, J., dissenting) (noting that "just because a competent defense attorney recognizes that a particular defense *might* be available to a particular offense, he or she could also decide it would be inappropriate to propound such a defense in a given case").

Under these circumstances, a reasonably competent defense attorney could have strategically opted not to seek an instruction on sudden passion. If the trial court had submitted an instruction, it would have been the appellant's burden to prove sudden passion by a preponderance of the evidence. *See Rios v. State*, 990 S.W.2d 382, 386 (Tex. App.—Amarillo 1999, no pet.). To be entitled to an instruction on sudden passion, there must be some evidence "that there was an adequate provocation, that a passion or an emotion such as fear, terror, anger, rage, or resentment existed, that the homicide occurred while the passion still existed and before there was reasonable opportunity for

the passion to cool; and that there was a causal connection between the provocation, the passion, and the homicide." *McKinney v. State*, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005).[1]

The evidence of sudden passion was weak and would likely have been discredited by the jury. There was no testimony from the appellant that he was acting under the influence of extreme emotion at the time of the shooting. Moreover, most of the provocation by the complainant occurred well before the murder. Sudden passion must be directly caused by and arise out of provocation by the deceased "*at the time of the offense*." TEX. PENAL CODE § 19.02(a)(2) (emphasis added).

The record reflects that the provocation by the complainant at the time of the offense was fairly nominal. The complainant arrived at the Hart residence, where he was not welcome, and parked on the opposite side of the street. *See* (VIII R.R. SX 76). Then he got out of the car, removed his shirt, and began smoking a cigarette. *Id.* The appellant came outside with a gun, confronted the complainant, and a verbal exchange ensued. *Id.*; (V R.R. 63-64). Then the appellant pointed the gun at the complainant and

[1] The majority opinion characterizes trial counsel's actions as "seeking the removal of the instruction from the jury charge." *See Hart*, 2021 WL 1920893 at *6. The majority mistakenly presupposes that, absent counsel's deficient performance in seeking the removal of the instruction, the trial court "would have submitted a sudden-passion instruction." *Id.* at *7. However, the record reflects that the trial judge included the instruction merely as a "proposal." (VII R.R. 5). Presumably, if trial counsel had requested a sudden passion instruction, he would have been required to articulate facts showing adequate provocation.

fired repeatedly as the complainant attempted to run for cover behind his car. (VII R.R. SX 76).

Reasonably professional trial counsel could have believed that the jury would not have found the complainant's conduct at the time of the offense to be particularly provocative. A rational trier of fact would likely have concluded that a reasonable person under the same circumstances would not have been so enraged or terrorized by the complainant's unwanted presence that—rather than simply calling the police—they would have retrieved a gun, left the safety of their home, and repeatedly fired a gun at an unarmed person.

The record further suggests that counsel strategically rejected the theory of sudden passion in favor of a mitigating theory that was better supported by the evidence. As noted by the dissent, defense counsel did not attempt to convince the jury that appellant shot the victim in a fit of sudden passion, but instead portrayed appellant "as a considerate family-man who wanted to protect his daughter from a persistent problematic boyfriend." *Hart*, 2021 WL 1920893, at *10 (Wise, J., dissenting).

Counsel presented multiple character witnesses at punishment who described appellant as a "calm," non-violent "family man" who loved and protected his family. (VI R.R. 9, 10; VII R.R. 8-9, 12, 14, 18, 20). During closing arguments, counsel urged the jury to assess a lenient sentence because the appellant was a protective father who simply wanted to put an end to his daughter's ongoing abuse:

> I wanted today to give you a little bit of insight into who Robert Hart is to help you make your decision on punishment. For 59 years Robert Hart has been relatively trouble free. For 40 years he's been married, 38 years he's been a father.
>
> You heard several people up there say Robert protects his family. May not be considered - - what he did may not legally be considered defending, but it's certainly protecting.
>
> Mr. Ray hounded his daughter. He terrorized her. He abused her.
>
> He'd had enough. I get it. I'm a dad.

(VII R.R. 22-23).

Counsel also presented testimony from Stephanie at the guilt-innocence phase of trial that the complainant had been stalking her over a long period of time, that she had attempted to end her relationship with him several times, and that she had unsuccessfully sought protective orders and restraining orders against him. (V R.R. 48-51, 62). Given the evidence of the ongoing nature of the conflict between the complainant and appellant's daughter, it was not objectively unreasonable for counsel to paint a sympathetic picture of appellant as a protective father who was determined to put an end to a recurring problem, rather than as a man who was suddenly provoked to extreme rage or terror. *See Okonkwo v. State*, 398 S.W.3d 689, 697 (Tex. Crim. App. 2013) (concluding that trial counsel was not ineffective for failing to request an instruction on mistake of fact where that theory was inconsistent with a theory advanced by counsel at trial).

In addition, the evidence supporting sudden passion was contradicted by surveillance footage which showed appellant approach the complainant, point the gun directly at him, and steadily aim the gun for several seconds before systematically opening fire. *See* (VIII R.R. SX 76). Within ten seconds after the complainant fell to the pavement, the surveillance video shows the appellant placing a gun in the complainant's hand in an apparent attempt to stage a claim of self-defense. *See id.*

Considering that the jury had already rejected appellant's claims of self-defense and defense of a third person at the guilt-innocence phase of trial, defense counsel could have reasonably presumed the jury would likewise be unsympathetic to an argument that the victim's conduct at the time of the offense was so provocative that appellant was suddenly overcome by a fit of passion. *See Wooten v. State*, 400 S.W.3d 601, 608 (Tex. Crim. App. 2013) (finding that the defendant was not harmed by the absence of a sudden passion instruction because it was highly improbable that the jury, having already rejected the theory of self-defense, would nevertheless believe that the defendant was so overcome by fear that he lost control).

Thus, the majority opinion erred in concluding that counsel's decision not to seek a sudden passion instruction could not have been motivated by sound trial strategy. *See Rios*, 990 S.W.2d at 386 (refusing to denounce counsel as ineffective in the absence of proof as to counsel's reasons for or strategy in not requesting a sudden passion instruction where the evidence supporting such an instruction was "internally inconsistent").

II. *The majority opinion's harm analysis improperly disregards the effect of the jury's rejection of appellant's theory of self-defense.*

The majority opinion further holds that appellant was prejudiced by his attorney's performance because there was a reasonable probability that, but for counsel's failure to request a sudden passion instruction, the jury would have imposed a more lenient sentence. *See Hart*, 2021 WL 1920893 at *7.

In determining that the jury would likely have believed that appellant acted under the influence of sudden passion, the majority opinion relies on this Court's analysis in *Trevino v. State*, 100 S.W.3d 232 (Tex. Crim. App. 2003). In that case, the State presented evidence that the defendant shot his wife three times and then staged the scene to make it appear as though he acted in self-defense. The defense claimed that the shooting was an accident and that Trevino acted in self-defense. The jury was instructed on self-defense, and it rejected that theory. The trial court refused to submit an instruction on sudden passion, and the jury assessed a sixty-year sentence. This Court found the absence of a sudden passion instruction to be harmful because the evidence of "staging" by Trevino would not necessarily have precluded the jury from finding that he killed his wife in a fit of sudden passion and then staged the crime scene afterwards. *See Trevino*, 100 S.W.3d at 242-43.

The majority finds the outcome in *Trevino* to be controlling here:

> Just as in *Trevino*, Hart shot a person with whom he was familiar and with whom he had an acrimonious history. Like the facts of *Trevino*, the evidence at the crime scene and in the video did not support a self-defense claim. And just as the jury in *Trevino* could have found appellant shot his

> wife under the immediate influence of a sudden passion, the jury here could have found that Hart acted, or overreacted, in a sudden passion in attempting to protect his family.

Hart, 2021 WL 1920893, at *8.

The majority's reliance upon *Trevino* is misplaced because there was plausible evidence in that case from which a jury could have rejected self-defense yet still reasonably found that the defendant was provoked into killing the victim. A heated argument took place between the victim and Trevino after the victim confronted him with the phone numbers of other women she found in his wallet. The victim fired a gun at Trevino, and a physical struggle ensued. *See McKinney v. State*, 179 S.W.3d 565, 569-70 (Tex. Crim. App. 2005) (distinguishing the victim's conduct in *Trevino*, which rose to the level of adequate cause, from mere verbal taunting and physical pushing). In addition to the evidence of provocation, there was evidence that Trevino was under the influence of extreme emotion when law enforcement arrived at the scene. *See Trevino*, 100 S.W.3d at 233 (Trevino was "freaking out," he sounded "scared and panicked," he was "upset and crying," he appeared to be "extremely upset," and he was "pacing").

Unlike *Trevino*, the complainant's conduct at the time of the offense did not give rise to adequate cause. The jury viewed surveillance video showing that the only provocation at the time of the offense was the complainant's unwanted presence across the street from appellant's home. Moreover, law enforcement arriving on the scene after the shooting described appellant's demeanor as "calm" and "composed." (IV R.R. 28).

The instant case is more analogous to *Wooten v. State*, 400 S.W.3d 601 (Tex. Crim. App. 2013). Wooten claimed that he got into an argument with the victim, the victim threatened to kill him, a firefight commenced, and he shot the victim in self-defense. *Id.* at 603. The jury was instructed on self-defense, but did not receive an instruction on sudden passion. The jury convicted Wooten of murder and assessed a sixty-year sentence.

In its harm analysis, this Court considered how the jury's rejection of self-defense affected the likelihood that the jury would have found in favor of Wooten on the issue of sudden passion. This Court reasoned that the jury's rejection of self-defense was indicative of a lack of harm:

> But a jury that had already discredited the appellant's claim that he reasonably believed deadly force to be immediately necessary would be unlikely to believe that, at the time the appellant first fired, he was actually experiencing a level of fear that caused him to lose control. Moreover, even had the jury believed that the appellant subjectively experienced such a level of fear, it would not likely have found that [the complainant's] behavior presented a provocation adequate to produce such a degree of fear in a man of ordinary temperament. Based on the record and evidence before us, it is exceedingly unlikely that the appellant suffered "some harm" as a result of the trial court's failure to give the jury a sudden passion instruction based on the appellant's assertion that terror or fear controlled his actions.
>
> *Id.* at 609-10.

The majority opinion erroneously rejects *Wooten's* harm analysis because, unlike *Wooten*, "the determination made by the jury here did not turn on Hart's credibility, as he did not testify at trial and there was video evidence of the interaction between Hart

and Ray." *Hart*, 2021 WL 1920893, at *8. These distinctions do not render *Wooten's* harm analysis inapplicable. Although appellant did not testify at trial, the success of his self-defense theory depended on the credibility of his statements to law enforcement that he fired his gun after Ray pointed a gun at him, he heard Ray fire the first shot, and he saw a gun in Ray's hand. (IV R.R. 115; VIII R.R. SX 77). If the jury had believed appellant's assertion that the victim fired the first shot, an acquittal would almost certainly have resulted. Considering that the jury rejected the theories that appellant acted justifiably in defense of himself or a third person, it is highly unlikely that the jury would nevertheless have believed that appellant was so overcome by fear that he lost his capacity for cool reflection.

Moreover, the surveillance footage of the shooting makes it significantly *less probable* that the jury would have found the victim's conduct at the time of the offense adequate to produce such passion in a person of ordinary temperament. The jury likely would have concluded that although the complainant provoked the appellant by arriving at his property uninvited, a person of ordinary temperament would not have been so overcome by emotion that he would have responded by gunning down an unarmed man. Thus, under the harm analysis set forth in *Wooten*, appellant has not shown a reasonable probability that the jury would have assessed a lower sentence if counsel had sought and received a sudden passion instruction. The majority erred by refusing to consider the impact of the surveillance footage or the jury's rejection of self-defense

on the probability that the jury would have found in appellant's favor on the issue of sudden passion.

PRAYER FOR RELIEF

The State prays that this Court will grant the State's grounds for discretionary review and reverse the judgment of the court of appeals.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing petition for discretion review contains 3,734 words, as represented by the word-processing program used to create the document. This document complies with the typeface requirements in Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in a 12-point typeface.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been submitted for service by e-filing to the following address:

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Date: 10/22/2021

No. PD-0795-21

In the
Court of Criminal Appeals of Texas
At Austin

———————♦———————

ROBERT EARL HART
Appellant
V.
THE STATE OF TEXAS
Appellee

———————♦———————

On Petition for Discretionary Review from
Appeal No. 14-19-00591-CR
In the Fourteenth Court of Appeals

Trial Court Cause No. 1524656
182nd District Court of Harris County, Texas
Hon. Danilo Lacayo, Presiding

———————♦———————

APPENDIX

———————♦———————

APPENDIX A

(Fourteenth Court of Appeals' majority opinion issued May 13, 2021)

Affirmed in Part, Reversed in Part, and Remanded, and Majority and Dissenting Opinions filed May 13, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00591-CR

ROBERT EARL HART, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1524656

M A J O R I T Y O P I N I O N

A jury convicted appellant Robert Earl Hart of first-degree murder and assessed punishment at 30-years imprisonment, including a fine in the amount of $5,000.00. Hart appeals his conviction and raises three issues on appeal: (1) Hart's counsel was ineffective by failing to suppress or object at trial to the admission of video surveillance footage during guilt-innocence; (2) Hart's counsel was ineffective when he rejected an instruction on sudden passion after the trial court

offered to include it in the court's charge at punishment; and (3) the trial court erred when it failed to include, sua sponte, an instruction on sudden passion in the court's charge on punishment as part of the law of the case in the punishment phase of the trial. Because we conclude that Hart's trial counsel was ineffective by rejecting a sudden-passion jury instruction, we affirm the portion of the judgment regarding appellant's conviction, reverse the portion of the judgment of the trial court regarding punishment, and remand the case to the trial court for a new punishment hearing.

I. BACKGROUND

Ronald Lynn Ray was a former boyfriend of Hart's adult daughter, Stephanie. At trial, Stephanie testified that Ray was abusive, violent, and controlling. She also testified that he tried to isolate her from her family, including confiscating her cellular phone. Stephanie contacted law enforcement authorities on several occasions because she was concerned that Ray would harm her or her family members. Stephanie testified that she tried to leave Ray several times but he would not leave her alone.

In September 2016, Stephanie was staying at her parents' home. Ray drove up to the home uninvited while the family was having lunch. Ray parked across the street from Hart's home, took off his shirt and started to smoke a cigarette while standing outside his vehicle with the car door open. Hart came outside shortly thereafter and approached Ray with a handgun. Words were briefly exchanged, and then Hart pointed his gun at Ray and shot. Hart shot several more times as Ray ran away to hide behind his vehicle. Ray collapsed near the back of his vehicle minutes later. Though it was disputed by Hart at trial, the State introduced evidence that Hart attempted to stage a self-defense claim by placing a handgun in Ray's hand. Hart also told law enforcement that he believed he heard a gunshot before he fired

his weapon.

Hart had several surveillance cameras on the front of his home, which captured the confrontation and shooting on video. This video was the foundation of the case for the State, as law enforcement witnesses testified that they did not intend to charge Hart with murder until they saw the surveillance video. Law enforcement gained access to the surveillance video because Hart's wife, Elizabeth, signed consent forms authorizing the Harris County Sheriff's Office, as well as the Harris County Constable, Precinct 3, the right to search and seize "any and all letters, papers, material and other property, which they desire."

II. ANALYSIS

A. Ineffective assistance of counsel claims

In issues one and two, Hart argues that his trial counsel was ineffective in failing to suppress or object at trial to the admission of video surveillance footage and by rejecting a jury instruction on sudden passion offered by the trial court.

1. Standard

To prevail on his claim that he did not receive effective assistance of counsel, Hart must show by a preponderance of the evidence that (1) his counsel's performance fell below an objective standard of reasonableness and (2) but for his counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986) (adopting *Strickland* analysis). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. A failure to make a showing under either prong defeats a claim for ineffective assistance. *Id*. at 700.

There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). In most cases, direct appeal is an inadequate vehicle for raising such a claim because the record is generally undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Id*.

The record must demonstrate that counsel's performance fell below an objective standard of reasonableness as a matter of law, and that no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of his or her subjective reasoning. *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). Though Hart did not file a motion for new trial alleging ineffective assistance of counsel, there is a record of his counsel's reasoning that the parties rely on in their arguments.

2. Hart's counsel chose not to pursue a motion to suppress

In issue one, Hart challenges the jury's finding of guilt because he asserts his trial counsel was ineffective in failing to move to suppress or object at trial to the admission of video surveillance footage that was the basis for the State's case. Failure to file a motion to suppress does not per se constitute ineffective assistance of counsel. *Wert v. State*, 383 S.W.3d 747, 753 (Tex. App.—Houston [14th Dist.] 2012, no pet.). The record reflects that Hart's trial counsel considered avenues for suppressing the video and ultimately did not believe he could support it. During pretrial proceedings, Hart's counsel informed the trial court that Elizabeth did not know what she was signing, but then later counsel stated that he did not have a motion to suppress because he had no evidence to support it. It is undisputed that Hart's counsel never attempted to elicit sworn testimony from Elizabeth on the

topic.

Even we were to assume it was objectively unreasonable for Hart's counsel not to bring a motion to suppress under these circumstances, Hart cannot make the required showing under the second prong of the *Strickland* test. To succeed on this ineffective-assistance-of-counsel claim, Hart must show harm—that the trial court would have granted the motion to suppress. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). Hart argues that the trial court would have granted the motion because it was clear that Elizabeth did not understand or fully consent to the search and seizure. We disagree.

A search conducted pursuant to voluntary consent is an established exception to the constitutional-warrant requirement. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Texas law requires the State to prove voluntariness of consent to search by clear-and-convincing evidence. *Reasor v. State*, 12 S.W.3d 813, 818 (Tex. Crim. App. 2000). The trial court must look at the totality of the circumstances surrounding the statement of consent to determine whether consent was given voluntarily. *Id*. We consider various factors in determining voluntariness of consent: age, education, and intelligence; any constitutional advice given, such as whether the consenting person had the option to refuse consent; whether the consenting person was in custody or restrained at the time, and the length of any such detention; and whether weapons were drawn. *See id.* (citing *Schneckloth,* 412 U.S. at 226). An officer's testimony that consent was voluntarily given can be sufficient evidence to prove the voluntariness of the consent. *See Martinez v. State*, 17 S.W.3d 677, 683 (Tex. Crim. App. 2000).

Although Elizabeth testified in the punishment phase of trial, she did not testify regarding her lack of consent to the search. Elizabeth's signed consent was admitted into the record during trial. And the Harris County Sherriff's Deputy,

Sofia Silva, who witnessed Elizabeth sign the second consent form, testified at trial. Deputy Silva advised Elizabeth that her consent was voluntary and allowed her as much time as she needed to read it. Elizabeth never asked any questions or sought any clarification as to the forms she was being asked to sign. Deputy Silva further testified that Elizabeth was not under arrest at the time she signed the form, was composed, and took approximately five minutes to review the form. The record also reflects that Elizabeth had already signed a similar consent form allowing the Harris County Constable, Precinct 3, to search the home. Though Elizabeth was sitting in the constable's vehicle during the discussion and signing of the consent forms, Elizabeth was a competent adult who was not detained or under duress, and she was advised of her option to refuse consent. We conclude that the State established Elizabeth's consent to the search by clear-and-convincing evidence. The only indication that Elizabeth may not have understood what she was signing was the statement made by Hart's counsel, which does not constitute evidence. *See Delgado v. State*, 544 S.W.2d 929, 931 (Tex. Crim. App. 1977).

Hart also argues that even if Elizabeth understood she was allowing officers to search her home, it was not established by clear-and-convincing evidence that that she had given consent for officers to search the family's surveillance equipment. The consent form signed by Elizabeth allowed law enforcement the right to search and seize "any and all letters, papers, material and other property, which they desire." Hart cites no authority or testimony to support his argument that the surveillance equipment in the home was not included in the "material and other property" language identified in the consent form. This court has previously determined that property for purpose of a search included surveillance equipment. *Foreman v. State*, 561 S.W.3d 218, 234 (Tex. App.—Houston [14th Dist.] 2018) (citing Code of Criminal Procedure article 18.02(a)(10) in evaluating search

warrant and probable-cause affidavit), *rev'd on other grounds*, 613 S.W.3d 160 (Tex. Crim. App. 2020); *see also* Tex. Code Crim. Proc. Ann. art. 3.01 (all words, phrases, and terms to be understood in usual acceptation in common language). Though the consent form does not specifically identify electronic devices or media, the consent is broad, and a fair reading of the consent form should have apprised Elizabeth that the surveillance system was included.

Hart further argues that someone without prior training and experience would have thought that the equipment was malfunctioning or not set to record.[1] It is unclear how this argument affects the voluntariness of Elizabeth's consent, and Hart does not support this argument with any authority or evidence. Elizabeth did not limit her consent in any manner; therefore, her understanding of the functioning of the surveillance equipment is immaterial. We conclude Hart's claim of ineffective assistance of counsel based on failure to bring a motion to suppress cannot be sustained on this record. *See Jackson*, 973 S.W.2d at 957 (claim of ineffective assistance could not be sustained based on record before appellate court because appellant failed to develop facts and details of search sufficient to show search was invalid).

We overrule issue one.

3. Hart's counsel rejected the sudden-passion instruction

In issue two, Hart challenges the assessment of his punishment arguing

[1] The forensic-video technician who retrieved the video footage testified at trial that the system was clearly receiving a live feed from the cameras on the front of the house when he arrived. He further testified that the buttons on the digital video recorder were initially not responding, so he restarted the system. He did not have to utilize any password or authorization to access and retrieve the stored video. *See Lown v. State*, 172 S.W.3d 753, 760–61 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (upholding denial of motion to suppress when evidence did not prove defendant manifested objective indication of his desire to keep certain files confidential).

counsel was ineffective by rejecting an instruction on sudden passion after the trial court offered to include it in the court's charge and then failed to present evidence to support such an instruction.[2] Hart asserts the first prong of the *Strickland* analysis is satisfied because there was no strategic reason for counsel to request the removal of the sudden-passion instruction from the charge. Hart's counsel stated on the record that he did not believe the facts in the case supported the instruction:

> THE COURT: Okay. So, I'm reading the jury charge with respect to the punishment phase of trial. And I proposed a — just for proposals — a special issue regarding sudden passion, adequate cause sudden passion. And, Mr. Dixon, you are telling you me that you do not want that in there. As you've discussed with the State, you don't believe the facts support it; is that correct?
>
> [DEFENSE COUNSEL]: That is correct, Judge. I went through about six pieces of case law, and there was one that was directly on point and it just — it wasn't supported by the facts.
>
> THE COURT: So, I'm going to take out the sudden passion part out of it. And other than that, do you have any — have you had an opportunity to read the charge yet?
>
> [DEFENSE COUNSEL]: Yes. I read it yesterday, Judge.
>
> THE COURT: Is there any objections, additions, subtractions?

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[2] The State argued that Hart failed to adequately brief issue two in that he failed to brief a claim that (1) he was entitled to an instruction on sudden passion and (2) trial counsel was ineffective for failing to present evidence of sudden passion at the punishment phase of trial. The State correctly identifies that an appellant's brief must contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i). However, briefing rules are construed liberally, and substantial compliance is sufficient. Tex. R. App. P. 38.9. With respect to Hart's briefing of his claim he was entitled to an instruction on sudden passion, we conclude there is no briefing waiver. *Id*.

Hart does not present any briefing demonstrating how his trial counsel failed to present evidence to support such an instruction. However, Hart clarifies in his reply that he did not intend for his second issue to be divided. Rather, he meant to "emphasize trial counsel's total abdication on this matter. . . [t]he fact that trial counsel failed to present evidence that would support the instruction when he had the opportunity to do so, simply underscores Appellant's contention." Because Hart is not asserting multiple issues, we need not address the State's argument as to inadequate briefing on Hart's claim that his counsel was ineffective for failing to present evidence of sudden passion at the punishment phase of trial. Tex. R. App. P. 47.1.

[COUNSEL FOR THE STATE]: Not from the State.

[DEFENSE COUNSEL]: Not from the defense.

a. Did the actions of Hart's counsel fall below an objective standard of reasonableness?

Hart was convicted of murder, which is punishable by imprisonment from five years to life. Tex. Penal Code Ann. §§ 12.32(a), 19.02(c). During the punishment phase of a murder trial, a defendant may argue that he caused the death while under the immediate influence of a sudden passion arising from an adequate cause. Tex. Penal Code Ann. § 19.02(d). "If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree." *Id*. If the jury had been allowed to consider the sudden-passion instruction and determined Hart acted under "the immediate influence of sudden passion arising from adequate cause," Hart's offense would have been punishable by imprisonment from two to twenty years. Tex. Penal Code Ann. §§ 12.33(a), 19.02(d).

"Sudden passion" is defined for these purposes as "passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense *and is not solely the result of former provocation*." Tex. Penal Code Ann. § 19.02(a)(2) (emphasis added). The "adequate cause" giving rise to sudden passion for these purposes is a cause "that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." Tex. Penal Code Ann. § 19.02(a)(1); *see also Beltran v. State*, 472 S.W.3d 283, 294 (Tex. Crim. App. 2015) (requiring causal connection between complainant's provocation, defendant's passion, and homicide). A defendant who presents evidence of sudden passion is entitled to an instruction on this mitigating circumstance "even if that evidence is weak, impeached, contradicted, or

unbelievable." *Trevino v. State*, 100 S.W.3d 232, 238 (Tex. Crim. App. 2003) (per curiam).

The State argues that the evidence did not raise the issue of sudden passion because the provocation by the victim was insufficient to cause "violent passion." In making this argument, the State overlooks evidence supporting the instruction, concluding the victim's behavior should have only caused irritation. Our review must focus on the evidence supporting the instruction, rather the evidence tending to show that Hart did not act under the immediate influence of sudden passion. *Beltran*, 472 S.W.3d at 294. Stephanie testified at trial that Ray was violent, and she believed that Ray was going to hurt her, as well as her father. She also testified that her father was aware of Ray's violent nature and had previously seen the "marks" on her from his abuse. She also testified that her father had seen threatening text messages sent by Ray to Stephanie's mother, Elizabeth, just days before the shooting.

Further, Stephanie and her younger sister were upset when Ray arrived, and she testified they both screamed for their father. The evidence supported a conclusion that Hart was acting out of terror or rage, or both. The video also established provocative behavior on Ray's part, who immediately removed his shirt on arrival and baited Stephanie and her father with his presence outside the property. The video does reflect a brief verbal exchange, though there is no sound in the video. Stephanie's testimony, along with statements by Hart to the homicide investigator, establish that Hart and Ray immediately started yelling at each other. Stephanie recalled hearing her father tell Ray he was not supposed to be at the home. The homicide investigator testified that Hart brought a gun outside to confront Ray because Hart told him that Ray had pulled a gun on his family in the past. A jury could reasonably conclude that Hart reacted pursuant to provocation

by Ray, which "would commonly produce such passion in a person of ordinary temper." *Beltran*, 472 S.W.3d at 294.

The timing of the incident supports a conclusion that Hart lost his capacity for cool reflection. Ray arrived at the house and had not been outside of his car for an entire minute before the shooting occurred. The jury could have determined that Ray's arrival outside Hart's home along with his provocative behavior began a causal chain leading to Hart's passion and ultimately Ray's death. We conclude there was evidence supporting Hart's entitlement to the sudden-passion instruction. *See Trevino*, 100 S.W.3d at 238. Though Hart's counsel believed that his client was not entitled to the sudden-passion instruction, this subjective belief is not controlling in our analysis. *See Lopez v. State*, 343 S.W.3d at 143. Because his reasoning for rejecting the instruction offered by the court was erroneous, it cannot form the basis for a sound trial strategy. *See Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992) ("Under the facts of this case, it would have been error for the trial court to refuse such an instruction, had one been requested. Counsel's performance in not seeking the instruction was clearly deficient."). We conclude that Hart's counsel's performance was deficient for seeking the removal of the instruction from the jury charge.

The dissent claims that we "eviscercate[] any discretion that seasoned criminal defense attorneys may exercise to pursue one defense strategy over another." However, that is not the case. The facts in this case are unusual and this opinion will not have any effect on seasoned criminal-defense attorneys who choose to pursue defensive strategies on behalf of their clients. As already discussed, this is not a situation in which Hart's counsel elected to pursue an alternative defensive strategy instead of seeking a sudden-passion instruction.[3]

[3] The dissent argues that Hart was not portrayed as a hot-headed man, but as a

Further reasoning that Hart's counsel believed "at that moment" that his client was not entitled to a sudden-passion instruction, the dissent argues that we should assume that counsel reasonably decided not to pursue the instruction.[4] However, the record does not support a sound trial strategy in the mistaken belief of Hart's counsel. While our appellate review should eliminate "the distorting effects of hindsight," our precedent also does not condone sweeping under the rug legal representation that falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687, 689.

b. Was Hart harmed?

Hart must next demonstrate that the trial court would have submitted the instruction to the jury and there was a reasonable probability that, but for counsel's

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considerate family man who wanted to protect his daughter from a problematic boyfriend. However, the Penal Code does not require that a defendant be a "hot head" in order to receive the sudden-passion instruction. The sudden-passion instruction is available to a defendant who causes the death of another "under the immediate influence of sudden passion arising from an adequate cause." *See* Tex. Penal Code Ann. § 19.02(a)(1), (a)(2), (d). The dissent's suggestion that Hart's portrayal as a considerate family man who simply "had enough" of the violent and manipulative behavior of his daughter's abusive boyfriend could form the basis of an alternate defensive strategy is misleading and ignores the plain language of the Penal Code. *See id*.

[4] The dissent cites case law for the proposition that it is not objectively unreasonable to fail to request an instruction when that instruction is inconsistent with a theory that counsel advanced at trial. *See Okonkwo v. State*, 398 S.W.3d 689, 697 (Tex. Crim. App. 2013). However, the cases relied on by the dissent are not applicable to the facts before us, because Hart's counsel told the trial court on the record that he did not believe the instruction was supported by the facts. Further, the cases advanced by the dissent focus on instructions and defenses applicable to the guilt-and-innocence phase of trial. *See id*.; *Dannhaus v. State*, 928 S.W.2d 81, 86–87 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); *Martini v. State*, No. 05-17-00693-CR, 2018 WL 3598978, at *3 (Tex. App.—Dallas July 27, 2018, no pet.) (mem. op., not designated for publication); *Roberts v. State*, No. 01-16-00059-CR, 2016 WL 6962308, at *5 (Tex. App.—Houston [1st Dist.] Nov. 29, 2016, pet. ref'd) (mem. op., not designated for publication); *Alonzo v. State*, No. 03-05-00849-CR, 2006 WL 2589194, at *4 (Tex. App.—Austin Sept. 8, 2006, no pet.) (mem. op., not designated for publication). Unlike the defensive issues raised in the cases cited by the dissent, the sudden passion-instruction is considered after the jury finds a defendant guilty of murder and operates only to reduce the punishment for murder. *See* Tex. Penal Code Ann. § 19.02(d); *see generally* 43 George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice and Procedure* § 43:69 (3d ed. 2011 & Supp. 2020).

failure to request the sudden-passion instruction, the outcome would have been different, resulting in a shorter sentence. *See Strickland*, 466 U.S. at 694; *see also Glover v. United States*, 531 U.S. 198, 200 (2001) (holding that, "if an increased prison term did flow from an error[,] the petitioner has established *Strickland* prejudice"). However, it is not enough to show that another sentencing option was available. *See Newkirk v. State*, 506 S.W.3d 188, 197–98 (Tex. App.—Texarkana 2016, no pet.). The exchange excerpted above between Hart's counsel and the trial court establishes for purposes of this inquiry the trial court would have submitted a sudden-passion instruction. Therefore, we review for harm, focusing "on the evidence and record to determine the likelihood that a jury would have believed that the appellant acted out of sudden passion had it been given the instruction." *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013).

In the context of a defendant's failure to receive a sudden-passion instruction, courts consider whether the jury, as here, already rejected a claim of self-defense as part of the harm analysis. "The evidence in a case in which a jury rejected a claim of self-defense could demonstrate also that the defendant was not harmed by the failure to receive a sudden passion charge, but the evidence in another such case might not demonstrate a lack of harm." *Trevino*, 100 S.W.3d at 242. Sudden passion and self-defense are not mutually exclusive, and a jury's rejection of self-defense does not necessarily preclude a sudden-passion instruction. *See Beltran*, 472 S.W.3d at 290. In *Trevino* and *Wooten*, on which Hart relies, the Court of Criminal Appeals addressed the question of how a jury's rejection of self-defense affects the harm analysis with respect to the erroneous denial of a sudden-passion instruction. *See Wooten*, 400 S.W.3d at 608; *Trevino*, 100 S.W.3d at 241.

In *Trevino*, defendant was charged with the murder of his wife. 100 S.W.3d

at 232, 236. Defendant claimed the shooting occurred after a heated argument and struggle over two guns. *Id*. at 233. According to the lead detective, defendant told him his wife confronted him with a gun after finding telephone numbers of other women in his wallet. *Id*. Defendant retrieved his gun, and after his wife shot at him but missed, the two struggled over the guns. *Id*. In the course of the struggle, defendant's wife was shot three times. *Id*. The detective testified the crime scene did not match defendant's story. *Id.* Based on this testimony, the State argued defendant shot his wife and then staged the scene to make it look like self-defense. *Id.* at 232, 235–36. The jury rejected defendant's claim the shooting was an accident and he acted in self-defense and, after the trial court refused to instruct the jury on sudden passion, assessed a 60-year sentence. *Id.* at 236. Agreeing with the court of appeals that defendant was harmed, the Court of Criminal Appeals noted the jury could have found defendant killed his wife in sudden passion and then staged the crime scene to make the killing appear to have occurred in self-defense. *Id.* at 241–43.

In *Wooten,* defendant was charged with murder after a gunfight with the victim. 400 S.W.3d at 602–03. According to defendant, who testified at trial, the victim dropped off defendant's girlfriend at defendant's apartment after "backing out" of a "date" with her. *Id.* at 603. Defendant greeted his girlfriend outside the apartment and approached the victim's car. *Id.* Defendant testified he saw the victim had placed a gun on the console but began talking with him. *Id.* When the conversation turned to why the "date" had not occurred, the victim's demeanor "became more combative." *Id.* When defendant told the victim he should pay his girlfriend "something for her time," the victim lashed out verbally and then shot at defendant. *Id.* Defendant allegedly shot back in self-defense, killing the victim. *Id.*

The jury rejected defendant's self-defense claim, and as in *Trevino*, when the

trial court refused to instruct on sudden passion, assessed a 60-year sentence. *Id*. at 603–04. The court of appeals, concluding the failure to instruct on sudden passion harmed defendant, reversed as to punishment. *Id*. at 604. Disagreeing defendant was harmed, the Court of Criminal Appeals observed "the success of appellant's self-defense claim boiled down to whether the jury would accept that, when he shot [the victim], he reasonably believed that deadly force was necessary to protect himself from [the victim's] use of deadly force." *Id*. at 607, 609. Noting deadly force was the only element of self-defense refuted by the evidence, the court concluded the jury rejected the inference the victim shot first because, had they believed defendant's testimony the victim shot first, the jury "almost certainly" would have acquitted defendant. *Id*. The court further concluded that, the jury, having rejected defendant's self-defense claim, "was highly unlikely" to find defendant acted under sudden passion. *Id*.

Unlike *Wooten*, the determination made by the jury here did not turn on Hart's credibility, as he did not testify at trial and there was video evidence of the interaction between Hart and Ray. We conclude the facts of this case are more like those in *Trevino*. Just as in *Trevino*, Hart shot a person with whom he was familiar and with whom he had an acrimonious history. Like the facts of *Trevino*, the evidence at the crime scene and in the video did not support a self-defense claim. *Trevino*, 100 S.W.3d at 233. And just as the jury in *Trevino* could have found appellant shot his wife under the immediate influence of a sudden passion, the jury here could have found that Hart acted, or overreacted, in a sudden passion in attempting to protect his family. *Id*. at 242–43. The jury was able to view Ray's arrival and provocative behavior, as well as the very short time that elapsed between Ray's arrival and the shooting.[5]

[5] Our sister court reached a similar conclusion in an unpublished case. *See Kitchens v.*

The jury also had enormous discretion to sentence Hart anywhere from five years to life, and it assessed a sentence of 30 years. If the sudden-passion instruction had been given, the jury would have been told that an affirmative sudden-passion finding would limit Hart's sentence to a maximum of 20 years. Tex. Penal Code Ann. §§ 12.33(a), 19.02(d). In assessing a 30-year sentence for a murder captured on video, the jury could have concluded that Hart did not act in self-defense but that he overreacted to Ray's provocation. Viewing the record as a whole, including the jury's sentence, a "reasonable probability" exists that the jury could have rejected Hart's self-defense claim, yet found that he acted under the influence of sudden passion arising from an adequate cause. Because a "reasonable probability" exists that the jury could have assessed a lower sentence with a punishment range between two to 20 years, our confidence in the conviction is undermined. *Strickland*, 466 U.S. at 694; *see also Vasquez v. State*, 830 S.W.2d at 951.

We sustain issue two. Because we have sustained issue two, we need not reach issue three. Tex. R. App. P. 47.1.

State, No. 01-18-00518-CR, 2019 WL 6482408, at *12–13 (Tex. App.—Houston [1st Dist.] Dec. 3, 2019, no pet.) (mem. op., not designated for publication) (defendant was harmed by trial court's failure to instruct jury on sudden passion when defendant shot stranger who showed up asking for whereabouts of individual who was not there and threatened defendant in confrontation lasting less than three minutes).

III. CONCLUSION

We affirm the trial court's judgment in part as to guilt, but reverse the portion of the judgment as to sentencing, and we remand the case to the trial court for a new punishment hearing.

/s/ Charles A. Spain
Justice

Panel consists of Justices Wise, Bourliot and Spain (Wise, J., dissenting).

Publish—Tex. R. App. P. 47.2(b).

APPENDIX B

(Fourteenth Court of Appeals' dissenting opinion issued May 13, 2021)

Affirmed in Part, Reversed in Part, and Remanded, and Majority and Dissenting Opinions filed May 13, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00591-CR

ROBERT EARL HART, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1524656

DISSENTING OPINION

The majority eviscerates any discretion that seasoned criminal defense attorneys may exercise to pursue one defensive strategy over another. I must respectfully dissent.

* * *

This court should apply the strong presumption that, in the absence of counsel being afforded an opportunity to explain his actions, counsel's decision not

to request a jury instruction on a defensive issue[1] was the result of reasonable strategy. *See Rios v. State*, 990 S.W.2d 382, 836 (Tex. App.—Amarillo 1999, no pet.) (overruling ineffective assistance claim; "In light of the absence of proof as to trial counsel's reasons for or strategy in not requesting the sudden passion mitigating instruction, we will not speculate on trial counsel's strategy, mental processes, or reasons for not requesting the instruction.").

Even if, as the majority concludes, appellant would have been entitled to an instruction on sudden passion if counsel requested it, "the failure to request the instruction was not objectively unreasonable because defensive issues frequently depend upon trial strategy and tactics." *Okonkwo v. State*, 398 S.W.3d 689, 697 (Tex. Crim. App. 2013) (quotation omitted) (reversing court of appeals and holding that trial counsel was not ineffective for failing to request a mistake of fact instruction). "[J]ust because a competent defense attorney recognizes that a particular defense *might* be available to a particular offense, he or she could also decide it would be inappropriate to propound such a defense in a given case." *Id.* (alteration in original) (quoting *Vasquez v. State*, 830 S.W.2d 948, 950 n.3 (Tex. Crim. App. 1992)).

If the record in this case reveals anything about counsel's reason for not requesting a sudden passion instruction, it is that counsel affirmatively considered the merits of requesting the instruction and rejected it. In light of counsel's consideration of case law that counsel determined was "directly on point," counsel

[1] *See Simpson v. State*, 548 S.W.3d 708, 710–11 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd) (holding that the accused must request an instruction on sudden passion to preserve error because it is a defensive issue); *Newkirk v. State*, 506 S.W.3d 188, 191–92 (Tex. App.—Texarkana 2016, no pet.) (same); *Espinoza v. State*, No. 14-99-00570-CR, 2000 WL 1591061, at *3–4 (Tex. App.—Houston [14th Dist.] Oct. 26, 2000, pet. ref'd) (mem. op., not designated for publication) (same); *see also Beltran v. State*, 472 S.W.3d 283, 290 (Tex. Crim. App. 2015) (referring to sudden passion as a "defensive issue").

concluded that he did not want a sudden passion instruction. Appellate court justices reviewing a cold record years after the fact have no idea what case law trial counsel considered and whether counsel's decision not to pursue a sudden passion instruction was the product of reasonable trial strategy. The majority cites not a single analogous case to undermine counsel's reasoned conclusion that appellant was not entitled to the instruction. And the majority ignores key tenants of review: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Based on his review of pertinent case law, counsel at that moment may have reasonably decided that appellant was not entitled to a sudden passion instruction. *Cf. Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (no deficient performance for failing to object to inadmissible testimony when "counsel *at that moment* may have reasonably decided that the testimony was not inadmissible and an objection was not appropriate").

At punishment, counsel portrayed appellant not as a hot-headed man who was overcome with emotions, but as a considerate family-man who wanted to protect his daughter from a persistent problematic boyfriend. Counsel argued that appellant simply "had enough" of the complainant. Given the modicum of evidence in this case that might have conceivably supported an instruction on sudden passion, counsel could not be held ineffective for pursuing an alternate strategy. *Cf. Okonkwo*, 398 S.W.3d at 697 (concluding that "counsel was not objectively unreasonable by failing to request an instruction on mistake of fact because that theory was inconsistent with a theory that counsel advanced at trial"); *Dannhaus v. State*, 928 S.W.2d 81, 86–87 (Tex. App.—Houston [14th Dist.] 1996,

pet. ref'd) (recognizing that counsel's choice of focusing the jury on the defendant's culpable mental state, rather than requesting instructions and pursuing other defenses for which the evidence was not strong, was not objectively unreasonable); *Martini v. State*, No. 05-17-00693-CR, 2018 WL 3598978, at *3 (Tex. App.—Dallas July 27, 2018, no pet.) (mem. op., not designated for publication) ("Where the evidence of guilt is overwhelming, and the evidence to support an affirmative defense is weak, a strategy of focusing the jury on the strongest theory of innocence supported by the evidence is not objectively unreasonable."); *Roberts v. State*, No. 01-16-00059-CR, 2016 WL 6962308, at *5 (Tex. App.—Houston [1st Dist.] Nov. 29, 2016, pet. ref'd) (mem. op., not designated for publication) ("Assuming without deciding that Appellant's testimony provides sufficient facts to warrant a self-defense instruction, Appellant's counsel could have reasonably determined that the evidence was weak enough that to include the instruction in the charge could risk credibility with the jury."); *Alonzo v. State*, No. 03-05-00849-CR, 2006 WL 2589194, at *4 (Tex. App.—Austin Sept. 8, 2006, no pet.) (mem. op., not designated for publication) (reasoning that counsel "might have decided for strategic reasons not to request the instruction on self-defense because of the risk of alienating the jury by arguing a point that, if supported by any credible evidence at all, was certainly weak").[2]

[2] We cannot say that counsel's determination that appellant was not entitled to a sudden passion instruction was unreasonable in light of the video evidence that the jury undoubtedly relied upon to reject appellant's claim of self-defense. The video shows that the complainant parked in front of appellant's house, got out of his car, removed his shirt, and began to smoke a cigarette. Appellant, wielding a pistol in his hand and carrying a revolver in his pocket, exited the safety of his own home and approached the complainant on the street. When the complainant held his arms outstretched to the side, appellant shot the complainant six times, including twice in the back while the complainant was running away. After the complainant collapsed, appellant removed the revolver from his pocket, fired it once into the ground, and placed it in the complainant's hand to stage a claim of self-defense.

The majority's analysis focuses solely on whether appellant would have been entitled to a requested instruction on sudden passion, not whether trial counsel might reasonably have decided not to pursue the instruction. In this regard, the majority fails to correctly apply the relevant legal principles for claims of ineffective assistance.

For these reasons, I dissent.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Bourliot, and Spain. (Spain, J., majority).
Publish — Tex. R. App. P. 47.2(b).

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